THE NATURE OF A POLICY OF INSURANCE WITH REGARD TO ITS ASSIGNABILITY.

THE contract of insurance[1] is defined as a contract by which the insurers agree to indemnify the person assured from any loss which he may sustain by reason of the perils insured against. Such is the uniform construction which courts of law put upon this contract without exception or qualification, whether the insurance relates to fire or marine perils. It has been said that the contract is not merely a contract of indemnity only, but a personal contract to indemnify the person originally insured: "it is not a contract to indemnify any one whatever, who may become interested in the subject insured during the continuance of the risks."[2] In the course of mercantile transactions, it is very common for policies of insurance to be assigned; and the question immediately occurs: if the contract is a personal contract, if in its nature the insurers only agree to indemnify the person originally insured in case he suffers loss in the subject insured, how is it that the contract may be assigned, that is, how can the assignee acquire the right to be indemnified for loss which he may suffer from the perils insured against? To attempt to answer this question is the subject of this article.

It is obvious that the contract of insurance may be assigned in one of two ways. In the first place, the policy may be assigned without the assignment of the property insured; or, secondly, the policy may be assigned together with the assignment of the property insured. The distinction is important, and must be kept in mind.

Where the assignment is of the policy only, there is no difficulty in reconciling this with the nature of a personal contract. All that is assigned in this case is the right to receive the insurance money, in case the interest of the person originally insured suffers loss from the perils insured against. The assignment is like the assign-

[1] The remarks in this article are to be applied only to marine and fire insurance, not to life insurance.

[2] Arnould, Marine Ins. (6th ed.), p. 112; Lynch *v.* Dalzell, 3 Bro. P. C. 497 (1729); Sadlers Co. *v.* Badcock, 2 Atk. 554 (1743).

ment of any other chose in action. The assignee is merely the person designated to receive the insurance, and he acquires only the rights of the assignor, and is subject to all the defences which the insurers have or may have against the person originally insured. No element of the personal contract is violated, for it is of no consequence to the insurers who receives the insurance money, so long as they are free from the claims of the person originally insured.[1]

But where the property insured is sold, and the policy is assigned, an entirely different question is raised. In this case, the person originally insured has parted with his entire interest in the subject-matter of the contract. He can suffer no loss, for he had no interest in the property at the time of the loss. The insurers cannot indemnify him, for he has no interest which can be the subject of indemnity. That interest is in the assignee, a stranger to the contract, who is neither a party nor a privy to the original contract, and it is he who suffers the loss.[2] If, then, the contract can be assigned, seemingly the whole conception of a personal contract will be done away with.

This objection was clearly seen by Chief Justice Shaw in Fogg *v.* Middlesex Mutual Fire Insurance Co.[3] "After such sale" (says Judge Shaw, referring to the sale of the property insured), "if nothing more is done,— no surrender or exchange of the policy, — and the goods should be burnt, nobody could recover on the policy ; not the original assured, for he has sustained no loss ; the property was not his, and the loss of it was not his loss ; not the purchaser, because he has no contract with the company. And although in popular language the goods are said to be insured against loss by fire, yet, in legal effect, the original assured obtains a guaranty by the contract that he shall sustain no damage by their destruction by fire. But in case of such sale or alienation of the insured property, the original assured having no longer any interest in the policy, except to claim a return of premium, if he will assign his policy or his contract of insurance to such purchaser, and the company assent to it, here is a new and original contract embracing all the elements of a contract of insurance between the assignee and

[1] Fogg *v.* Middlesex Mut. F. Ins. Co., 10 Cush. 337; Carpenter *v.* Providence Washington Ins. Co., 16 Peters, 495 (1842); Loring *v.* M'f'rs Ins. Co., 8 Gray, 28 (1857).

[2] Lynch *v.* Dalzell (*supra*); Sadlers Co. *v.* Badcock (*supra*).

[3] 10 Cush. 337.

the insurers. The property having become the purchaser's, is at his risk, and if burnt it is his loss, and he has a good original contract upon a valid consideration to guarantee him against such loss. . . . . Upon each assignment perfected, there is an entire change in the contract, in the party contracted with, in the insurable interest in the property at risk, and it becomes an insurance on the property of the assignee, and ceases to be a contract of insurance of the property of the assignor."

If, of course, in all cases, a new premium note was given to the insurance company by the assignee of the contract at or before the time of the assignment of the policy, these remarks of Chief Justice Shaw would be perfectly adequate to explain the liability of the company to the assignee of the contract. But this is by no means always done. How, then, can the liability of the insurance company to the assignee be explained? Where is the consideration for their new contract?

Chief Justice Shaw has also offered a possible explanation of this case too. "The exemption of the insurer from further liability to the vendor, and the [retention of the] premium paid for insurance for a term not yet expired, are a good consideration for such promise, and constitute a new and valid contract between the insurer and the assignee."[1]

It is hard to see how the person originally insured has any claim upon the insurance company for a return of the premium paid for a term not yet expired. Apart from any special agreement for the return of premium, his claim will rest entirely upon a failure of consideration; and there has been no failure of consideration here, either partial or total. The contract in favor of the insured still exists after the assignment of the property, and if subsequently any interest in the subject-matter of the insurance becomes vested in the insured during the continuance of the policy, the insured will be protected from any loss to his interest.[2]

Yet the suggestion, that the exemption of the insurer from further liability to the vendor is a sufficient consideration for the new promise, may afford an explanation of this question. It is apparent that this explanation depends entirely upon principles of novation. The argument is that the old obligation to the vendor is released in consideration that the insurer incurs a new obligation to the vendee. The writer is unable to see how this doctrine of

[1] Wilson *v.* Hill, 3 Met. 66, 69. [2] P. 397 (*infra*).

novation can be justified upon any principles of the common law. It is clear that it violates a fundamental principle in regard to consideration, viz., that the consideration must move from the promisee. In the present case, the promisee suffers no detriment and makes no change of position at the request of the promisor, and he has given nothing to the insurer for the benefit of the promise, so that from him there is no consideration. Furthermore, the circumstances of the transaction will hardly justify this view, even if the doctrine of novation be admitted. In their bare detail they amount to this. The property insured is sold, and the policy is handed over either with or without a written assignment. The policy is then taken by the assignee to the insurance company, and they consent to the assignment. It is sometimes customary for the assignment and the consent to be in writing, and then the consent is usually indorsed on the policy. Nothing more is done, and it is difficult to see how these facts can be construed to mean a surrender of an old obligation and the issue of a new one,—particularly as the same obligation is reissued which was issued in the first place.

But in policies like that which was transferred in Fogg *v.* Middlesex Mutual Fire Insurance Co., there is a condition that the policy shall be void if the property be assigned. In most cases the property is assigned before the consent of the insurer is obtained, and this condition is broken, therefore, before the consent of the insurer to the assignment is obtained. The obligation of the insurers, therefore, is avoided, and hence there is no legal obligation which can be surrendered in return for the new obligation; and yet the assignment is perfectly effectual against the insurance company.[1]

The conclusion therefore is irresistible, that if the contract of insurance is a personal contract,— that is, a contract which is confined to an indemnity of the person originally insured, —an assignee of the contract of insurance has no rights against the underwriter. Yet a perfectly adequate explanation of the rights of an assignee is afforded if we modify this view somewhat, as is suggested in Judge Hare's notes to the "American Leading Cases."[2] In speaking of Judge Shaw's views (*supra*), he says:

[1] Shearman *v.* Niagara Fire Ins. Co., 46 N. Y. 526. See Stein *v.* Niagara Ins. Co., 61 How. Pr. 144; Hooper *v.* Hudson R. F. Ins. Co, 17 N. Y. 424.

[2] 4th ed., vol. ii. p. 615.

"The mistake would seem to have originated in the supposition that a policy of insurance should be construed as if it were an engagement to indemnify the person first insured and could not be carried farther without a new contract. If the premise be conceded we must admit the conclusion, for no argument can be necessary to show that a promise to save A harmless cannot be enlarged by a transfer to B, nor enforced by him for his benefit, unless A has been injured, and then only to the extent of that injury. An assignment passes the right which the assignor has as he has it, and simply entitles the assignee to claim whatever is or may become due to the assignor. Hence, if the obligation imposed by the insurance of a house or vessel were limited to indemnifying those by whom or on whose behalf the insurance is effected, no recovery could be had after a sale, whether the suit were brought in the name of the vendor or in that of the purchaser, and whether the sale was or was not accompanied by an assignment of the policy; because it would be sufficient answer to say that the person to be indemnified had parted with his interest before the property was destroyed, and, consequently, had sustained no damage by the loss, which would be a good defence in the nature of a plea of *non damnificatus*. But if the policy is construed as a contract for the benefit, not only of the insured but of those who claim under him subsequently, as purchasers of the property and the insurance, the necessity for resorting to a new contract will disappear, and there will be no difficulty in adjusting the rights of the parties on their true basis. Thus interpreted, the operation of a policy of insurance would be somewhat analogous to that of the numerous covenants which run with land, and entitle those who claim under the covenantee by descent or purchase to the full benefit of the stipulations made by the covenantor."

In effect, then, Judge Hare's explanation is, that the agreement of the underwriters is to indemnify not only the person originally insured, but all persons who shall become legal assignees of the property and the policy. And this seems to the writer to be the true explanation.

It is obvious that this explanation accords with the intention of the parties at the time the contract is made. It cannot be said that the person originally insured contemplates only his own indemnity. He regards an insurance policy more in the nature of an insurance of the property than an insurance of his own interest in

that property, and contemplates that not only will he himself be protected from loss, but every one else who acquires his interest, and acquires the benefit of his policy. Even where there is a clause against alienation of property or policy, his conception of the policy is not changed. Insurance companies readily give their consent to the alienation, and in that case the alienee is protected.

When the property and policy have been assigned, and the insurers have consented to the assignment, if there be a condition against assignment without consent, the assignee becomes substituted to all the rights and duties of the assignor with respect to the policy. It is the assignee whose interest is insured; it is the assignee whose act will occasion a breach of condition. The assignor drops out of the contract entirely, and the assignee steps into his place with all his rights and liabilities.[1] No act of the assignor will then affect the rights of the assignee, but the distinction above indicated between an assignment of the policy only and an assignment of the property and policy must be carefully drawn. This distinction has become very important in the common case of an assignment of a policy by a mortgagor to a mortgagee as collateral security for the debt. After the assignment is made and consent is given, the question arises, Who is the insured? Is it the mortgagor or the mortgagee? If it is the mortgagee, it is obvious that any breach of condition by the mortgagor, as, for instance, an alienation of the equity of redemption, will not affect the mortgagee; while, if it is the mortgagor, such alienation will defeat the mortgagee. The question rests entirely upon the distinction between an assignment of the property and policy and the assignment of the policy only; and the courts, though inclined at first to protect the mortgagee, have finally adopted the view that the mortgagor is still the insured, and that his acts will avoid the policy. This view seems to be the prevailing view.[2]

The question arises, How far do the acts of the assignor, done before the assignment of the policy, affect the assignee? Obviously this involves the question, whether an insurance policy is negotiable or not; and it is an interesting one, though, unfortunately, one on which there is no authority. There are many *dicta* that a policy of insurance is not negotiable, and the tendency of the

[1] Fogg *v.* Middlesex Mut. F. Ins. Co. (*supra*).

[2] See the cases collected in 2 American L. C. (5th ed.), pp. 891 and *seq.*

courts no doubt inclines towards this view. Yet policies of insurance and bills of exchange are frequently classed together. Says Skinner's Reports, "though neither of them are specialties, yet they are of great credit, and much for the support, conveniency, and advance of trade."[1] Justice Buller, in Master *v.* Miller,[2] upon a question in the law of bills of exchange, says, in regard to the non-assignability of a chose in action: "I can find no instance in which the objection has prevailed in a mercantile case; and in the two instances most universally in use it undoubtedly does not hold, that is, in the cases of bills of exchange and policies of insurance. The first is the present case, and bills are assignable by the custom of merchants; so in the case of policies of insurance, till the late act was made requiring the name of the person interested to be inserted in the policy, the constant course was to make the policy in the name of the broker, and yet the owner of the goods maintained an action upon it."

Policies of insurance are sometimes made payable to bearer or to order; and this would seem to point very strongly toward their being negotiable. Mr. Phillips says, in his Treatise on the Law of Insurance:[3] "A marine policy of insurance on goods seems to be precisely similar to a bill of lading as to its assignableness, provided it imports on its face a responsibility directly to the assignee of the goods, and I accordingly venture to state it as the better doctrine that the interest in a marine policy, purporting on its face to insure the owner of the goods, whoever he may be, is assignable with the goods to the effect of giving the assignee a right to make demand and bring suits upon it in his own name. And the same doctrine is, I think, applicable to a similar policy upon a vessel or one against fire upon land." Mr. Duer is of opinion that insurance policies, like bills of exchange, are negotiable, and that a *bona fide* purchaser for value will take the policy, subject, to be sure, to every legal defence which would be available against the original insured, but free from all equities existing between the original insured and the underwriter.[4] In fact, a continental writer goes so far as to say that policies are in their nature negotiable without special words

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[1] Skinner R. 55.
[2] 4 T. R. 320.
[3] Pp. 53 and 54, 5th ed.
[4] 2 Duer, Ins. 52.

of negotiability.[1] But this is disputed by Emerigon, who declares that words of negotiability are necessary.[2]

The writer has been unable to find any case in which an action has been brought by an assignee upon a policy payable to order or bearer. The nearest approach to it is an action upon a policy made "for whom it may concern at the time of the loss." There the action was brought by the assignee of a mortgagee whose mortgage was given subsequently to the issue of the policy. It was held that he might sue for his own loss in a court of equity; and furthermore, that inasmuch as he was a purchaser for value without notice, he was entitled to his insurance money without any deduction for unpaid premiums due from the original insured, although the insurance agent would have had a lien upon the insurance moneys as against the original insured.[3] Yet this doctrine was disapproved in an action upon a policy "for whom it may concern" in two early cases in Pennsylvania.[4] In Gourdin *v.* Ins. Co. of North America an insurance policy was likened to a bond for the payment of money, and it was held that every defence which was available against the assignor was available against the assignee, with the one exception, where the insurer was estopped from setting up the defence.

The theory of Chief Justice Shaw above cited is applied only to fire insurance, though it might be applied to marine insurance in case there was a condition in a marine policy against the assignment of the property insured. There is no inherent difference between the contract of marine insurance and the contract of fire insurance. Both are contracts of indemnity; both are personal contracts with the insured, and both are mercantile contracts ordered and controlled by the custom of merchants. Yet the courts seem to have ruled from the earliest times that, in the case of fire insurance, no assignment of the policy and property will be valid without the consent of the insurer thereto,[5] while in marine insurance no such consent is necessary.[6] But the writer ventures

[1] 2 Valin, 45.

[2] Duer, Ins. p. 52, note (a).

[3] Rogers *v.* Traders' Ins. Co., 6 Paige, 583.

[4] Rousset *v.* Ins. Co. of N. A., 1 Binney, 429; Gourdin *v.* Ins. Co. of N.A., 1 Binney, 430.

[5] Lynch *v.* Dalzell (*supra*); Sadlers Co. *v.* Badcock (*supra*).

[6] Arnould, Marine Insurance (6th ed.), 117; Powles *v.* Innes, 11 M. & W. 10 (1843); Wakefield *v.* Martin, 3 Mass. 558 (1801); Earl *v.* Shaw, 1 Johns. Cas. 313 (1800).

to suggest that this distinction is erroneous, in spite of numerous *dicta* to the contrary.

No case can be found in which this point has been ruled, where an express condition against assignment was not contained in the policy, and no text-writer and no court has offered any sufficient reason why this distinction should be made. The better view is that a marine policy and a fire policy do not differ at all in this respect, except that, from the earliest times, fire policies have always contained a condition against assignment, while marine policies have contained no such condition. A fire policy, therefore, is assignable in the same way as a marine policy, and no consent is necessary, unless there be a condition against assignment.

Before the Statute of 31 and 32 Victoria, c. 86, in cases of marine insurance it was the law that the assignee should sue in the name of the assignor, though the loss recovered in such an action was not the loss of the assignor, but the loss of the assignee,— an anomaly which it is very difficult to explain.[1] The law is the same in regard to fire insurance in many States.[2]

A few words remain to be said upon the point, what acts are necessary to make the purchaser of the property insured the assignee of the policy. The policy may be assigned either at the time of the sale of the property, or afterwards. If the policy is assigned at the time of the sale, it is quite clear that the assignee becomes the assured. If the property is first sold, and subsequently the policy is assigned, a question has arisen whether the assignment of the policy is effectual to protect the assignee. Of course, if the loss occurs before the assignment, neither the assignor nor the assignee can hold the insurer. But where the policy is assigned before loss, it has been contended, on the one hand, that the contract of insurance, in order to be valid, necessarily postulates an insurable interest; and if, during the continuance of the risk, that insurable interest ceases to exist, the policy drops. There is authority which seems to uphold this view.[3] On the other hand, it may be said that the contract of insurance means that the insured is to be

[1] Delaney *v.* Stoddart, 1 T. R. 22 (1785); Sparkes *v.* Marshall, 2 Bing. N. C. 761 (1836); Powles *v.* Innes, 11 M. & W. 10 (1843); see L. R. 10 Q. B. 249. These cases are not decisions, but *dicta;* yet the *dicta* are so strong that they cannot be controverted.

[2] 2 American L. C. (5th ed.), 887, and cases cited.

[3] North of England Oil Cake Co. *v.* Archangel Ins. Co., L. R. 10 Q. B. 249. See judgments of Lush and Quain, JJ., pp. 254, 255, also see p. 253; Cockerill *v.* Cincinnati Ins. Co., 16 Ohio, 148.

indemnified from any loss which he may suffer during the period named in the policy. If he aliens the property insured, it is true that if the property is destroyed when he has no interest therein, it is not possible for him to hold the underwriter, for he has suffered no loss. But the contractual relation between the insurer and the insured still exists in spite of the sale of the property, and if, during the period named in the policy, he regains an interest in the property, and suffers a loss of that interest, there seems to be no reason why the insurers should not be held therefor. The insured has paid his premium to be protected for the period for which the policy is issued, and it would be a hardship to him not to have the benefit of that premium.

This view would satisfactorily account for the cases in which the insured aliens the interest originally insured, but retains an interest in the property insured; as, for instance, where he sells his land, at the same time retaining a mortgage to secure the purchase-money. This view has been adopted by both Mr. Phillips and Judge Hare, and is supported by authority.[1]

It is well settled that the policy does not pass as a mere accessory to the property.[2] The policy must be assigned, and this rule applies as well to marine insurance as to fire insurance. A mere delivery of the policy would seem to be a sufficient assignment;[3] but if there is no actual delivery, the assignor must agree to assign, or, what is much the same thing, agree to hold the policy for the benefit of the assignee. In the words of Baron Parke, the parties must keep the contract of insurance alive for the benefit of the assignee.[4]

In most policies of fire insurance at the present day, it is customary for the insurers to insert a number of clauses which provide that the policy shall be void in case the provisions of them are not complied with. Two very common clauses are the clauses against alienation of the property insured, and the assignment of the policy. It is settled that these clauses are conditions the non-

[1] 1 Phillips, Ins. 488; 2 Amer. L. C. (5th ed.) 893; Lane *v.* Maine, etc., Ins. Co., 12 Me. 44; Hooper *v.* Hudson River F. Ins. Co., 17 N.Y. 424; Wolfe *v.* Security F. Ins. Co., 39 N.Y. 49. See Shearman *v.* Niagara Fire Ins. Co., 46 N.Y. 526; Worthington *v.* Bearse, 12 Allen, 382.

[2] Lynch *v.* Dalzell; Powles *v.* Innes (*supra*); North of England Oil Cake Co. *v.* Archangel, Maritime Ins. Co. (*supra*); Lahiff *v.* Ashuelot Ins. Co., 60 N.H. 75.

[3] Sparkes *v.* Marshall, 2 Bing. N. C. 761.

[4] 11 M. & W. 13.

performance of which render the policy voidable by the insurers. As they are conditions, their performance may be waived; and, consequently, though in case of the assignment of a policy of insurance without the consent of the insurers or alienation of the property insured, the policy may be avoided, yet, if the insurer consents to the assignment, he waives the condition against assignment or alienation, and the alienee's rights under the policy are secure.[1]

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[1] Oakes *v.* M'f'rs. Ins. Co., 135 Mass. 248.